Supreme Court, U.S.
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No. 92-2023

IN THE

Supreme Court of the United States

October Term, 1992

RAUL FELICIANO, JR., *et al.*,
Petitioners,

vs.

CITY OF CLEVELAND, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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22 pp

QUESTIONS PRESENTED

The correct presentation of the questions addressed to the Court by Petitioners is as follows:

Whether a municipal policy not to hire users of illegal drugs as police officers can expose the city to liability under 42 U.S.C. §1983 such that it can fairly be said that the city is the wrongdoer, where the alleged constitutional violation was a surprise drug test of a police cadet class, conducted at the unilateral direction of a non-policymaking official, and where the Petitioners' claim of municipal liability is not based upon a failure to train.

Whether individual Respondents may be liable for violating Petitioners' right to substantive due process as a result of drug testing police cadets by urinalysis in 1985, in which some of the cadets were required to produce urine samples under direct observation, and in which the urine samples were tested through enzyme immunoassay ("EMIT"), thin layer chromatography ("TLC"), and radioactive immunoassay ("RIA"), and the samples testing positive for marijuana and/or cocaine were confirmed positive through gas chromatography/mass spectrometry ("GC/MS").

PARTIES BEFORE THE COURT OF APPEALS

The Petitioners are Raul Feliciano, Jr., Richard Rojas, Valeria Greathouse, Robert S. Beavers, Richard Zappala, and Darryl T. Hood. The Respondents are the City of Cleveland, a municipal corporation of the State of Ohio; and, in both their individual and official capacities, William T. Hanton, formerly Cleveland Chief of Police; the late Reginald M. Turner, formerly Cleveland Director of Public Safety; Lloyd Bratz, formerly a Cleveland Sergeant of Police; William Bartley, a Cleveland Sergeant of Police; Glen Groudel, formerly a Cleveland Lieutenant of Police; and Ronald James, a Cleveland Sergeant of Police.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES BEFORE THE COURT OF APPEALS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF THE CASE 3

REASONS WHY THE PETITION SHOULD BE DENIED 6

CONCLUSION 12

APPENDIX:

Order (Margin Entry) of the United States District Court, Northern District of Ohio, Case No. C85-3356, *Feliciano v. Cleveland* (April 11, 1986) A1

Order of the United States District Court, Northern District of Ohio, Case No. C85-3356, *Feliciano v. Cleveland* (December 14, 1989) A3

TABLE OF AUTHORITIES

Cases:

Anderson v. Creighton, 483 U.S. 635 (1987) 9

Bishop v. Wood, 426 U.S. 341 (1976) 10

Canton v. Harris, 489 U.S. 378 (1989) 7,8

Capua v. Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) 11

Collins v. Harker Heights, _____ U.S. _____, 112 S. Ct. 1061 (1992) 7,9

Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988) 11

Daniels v. Williams, 474 U.S. 327 (1986) 9

Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987) 11

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 10

Graham v. Connor, 490 U.S. 386 (1989) 11

Jett v. Dallas Indep. School Dist., 491 U.S. 701 (1989) 8

Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986), *rev'd in part*, 833 F.2d 335 (D.C. Cir. 1987), *vacated sub nom. Jenkins v. Jones*, 490 U.S. 1001 (1989), *aff'd and amended*, 878 F.2d 1476 (D.C. Cir. 1989) 11

McKenna v. Philadelphia, 771 F. Supp. 124 (E.D. Pa. 1991) 10

Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978) 6,7

Montana v. United States, 440 U.S. 147 (1979) 7

Moore v. East Cleveland, 431 U.S. 494 (1977) 10

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 7,10,11

O'Connor v. Ortega, 480 U.S. 709 (1987) 8

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 7,8

Rochin v. California, 342 U.S. 165 (1951) 10

Rushton v. Nebraska Pub. Power Dist., 653 F. Supp. 1510 (D. Neb. 1987), *aff'd*, 844 F.2d 562 (8th Cir. 1988) 11

St. Louis v. Praprotnik, 485 U.S. 112 (1988) 8

Shield Club v. Cleveland, 647 F. Supp. 274 (N.D. Ohio 1986), *rev'd and remanded*, 838 F.2d 138 (6th Cir. 1987) 6,7

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) 10,11

Springfield v. Kibbe, 480 U.S. 257 (1987) 8

Weicks v. New Orleans Police Dep't, 706 F. Supp. 453 (E.D. La. 1988), *aff'd*, 868 F.2d 1269 (5th Cir. 1989) 10

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 988 F.2d 649. It is also reprinted in the Appendix to the Petition for Writ of Certiorari at Petition pp. A1-A14.

The memorandum decision of the United States District Court for the Northern District of Ohio (Aldrich, *J.*), filed November 26, 1991, has not been reported. It is reprinted in the Appendix to the Petition for Writ of Certiorari at Petition pp. A57-A117.

Earlier decisions in the case include the opinion of the United States Court of Appeals for the Sixth Circuit, filed April 10, 1987, reversing and remanding the District Court's denial of the individual Respondents' motion for summary judgment on the ground of qualified immunity. That opinion, which has not been reported, is reprinted in the Appendix to the Petition for Writ of Certiorari at Petition pp. A15-A16. The margin entry of the United States District Court (Aldrich, *J.*) denying the individual Respondents' motion for summary judgment on the ground of qualified immunity, filed April 11, 1986, is reprinted in the Appendix hereto, pp. A1-A2, *infra*.

The interlocutory decision of the United States District Court (Aldrich, *J.*), filed June 12, 1987, granting Petitioners' motion for partial summary judgment and denying Respondents' motion for summary judgment on the Fourth Amendment claim was reported at 661 F. Supp. 578, and is also reprinted in the Petition for Writ of Certiorari at Petition pp. A17-A56. The Order of the United States District Court (Aldrich, *J.*), filed December 14, 1989, *sua sponte* vacating that decision has not been reported. It is reprinted in the Appendix hereto, pp. A3-A4, *infra*.

STATEMENT OF THE CASE

In October, 1985, Cleveland Police Chief William Hanton was informed in confidence that recruits enrolled in the Cleveland Police Academy were using narcotics. (R. 180.) Chief Hanton contacted the police medical unit to determine whether drug testing of the cadet class could be accomplished prior to its upcoming graduation date, October 25, 1985. The Chief and the medical unit chose SmithKline Laboratories, with a local office in Beachwood, Ohio, as a testing laboratory with a good reputation and experience in drug testing. (R. 180.)

The Chief caused officers of the Police Academy and the internal affairs unit to be advised of the problem and his intention to test the cadet class. (R. 180.) The Chief directed that police personnel from internal affairs were to provide security, to maintain the dignity and confidentiality of the submission of the samples, and to assist in any subsequent investigation. (R. 180.) Such follow-up investigations would be administrative, not criminal, in nature. (*Id.*)

Chief Hanton testified that he also advised the Director of Public Safety, Reginald Turner, that a drug test was going to be done, since Director Turner was the cadets' appointing authority. (R. 180.) Director Turner had no input into the procedures to be used for the drug testing. (*Id.*)

Chief Hanton ordered officers from the medical unit, internal affairs, and the Academy to go ahead with the testing for drug usage among the cadets. (R. 180.) Chief Hanton did not select the type of test to be run. (*Id.*) The Chief did not tell his officers how to conduct the testing; he directed them only to test according to the medical standards and directions of SmithKline Laboratories, and

to thoroughly maintain the proper chain of evidence. (*Id.*) Chief Hanton was assured by representatives of SmithKline that the initial test results would not show positive results for mere passive inhalation of marijuana smoke. (R. 180.) In order to be certain of the accuracy of the test results, he directed that the cadets' samples that were positive be confirmed through the more expensive, more sophisticated gas chromatography/mass spectrometry (GC/MS) analysis. (R. 180.)

On October 21, 1985, all 43 cadets were drug tested. Urine samples were collected in the restrooms at the Police Academy. Of the six Petitioners, four produced their urine samples under observation and/or at a urinal; two did so in private bathroom stalls.

All of the cadets' urine samples were screened by SmithKline for commonly abused drugs through thin layer chromatography ("TLC") and an enzyme immunoassay test ("EMIT"). Those samples that tested positive were retested with a radioactive immunoassay test ("RIA"). The samples of 13 recruits out of the class of 43 tested positive for marijuana or cocaine or both. The Petitioners' samples all tested positive for marijuana, and one Petitioner's sample tested positive for cocaine as well. Samples from every cadet that tested positive were confirmed positive through GC/MS. (R. 70.) All of the cadets whose samples tested positive were permitted to submit a second urine sample. All of the second samples tested positive through GC/MS.

The relevant procedural history of this case is summarized in the opinion of the District Court entering judgment in favor of Respondents. (Pet. pp. A59-A62.) The Court of Appeals for the Sixth Circuit subsequently

affirmed the District Court's entry of judgment in favor of the Respondents. *Feliciano v. Cleveland*, 988 F.2d 649 (6th Cir. 1993). The Court of Appeals determined that the Respondent City of Cleveland was not liable to the Petitioners under 42 U.S.C. §1983 because their claimed injuries were not the results of execution of municipal policy or custom. 988 F.2d at 654-56. The Court of Appeals also affirmed the judgment in favor of the individual Respondents, finding that the Petitioners' Fourteenth Amendment right to substantive due process was not violated. 988 F.2d at 656-58.

REASONS WHY THE PETITION SHOULD BE DENIED

Since October, 1985, when the Cleveland police cadets were drug tested, this Court has announced many significant decisions concerning municipal liability under §1983 and the constitutionality of employee drug testing. Although some of the legal issues in this case were unresolved in 1985, those issues have been settled in the interim. Consequently, further review of this case will neither alter the outcome for the parties involved, nor clarify the law relevant to its determination.

A. No Municipal Policy Under 42 U.S.C. §1983.

In order to establish their claim under 42 U.S.C. §1983 against the City of Cleveland, the Petitioners were required to demonstrate that their alleged constitutional injuries were inflicted by execution of the City's policy or custom. *See Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 694 (1978). The Petitioners failed to establish that Police Chief Hanton, who ordered the testing, was a final policymaker with respect to the drug testing of police cadets, and they have abandoned that issue in their Petition. Instead, they claim that in a different lawsuit, *Shield Club v. Cleveland,* 647 F. Supp. 274 (N.D. Ohio 1986), *rev'd and remanded,* 838 F.2d 138 (6th Cir. 1987), it was established that the City has a policy against appointing illegal drug users as police officers. Petitioners claim that the policy identified in *Shield Club* may be applied to their case through collateral estoppel to satisfy the policy requirement of their §1983 claim against the City.

The "policy" that the Petitioners find in the *Shield Club* opinion is to deny final appointment as a patrol officer to any police cadet who is a user of controlled

drug substances. *See Shield Club, supra,* 647 F. Supp. at 281. The proceedings in *Shield Club,* an employment discrimination case, did not involve a claim under 42 U.S.C. §1983. The *Shield Club* court did not use the word "policy" in its opinion in the technical sense of a *Monell* policy. The *Shield Club* decision did not involve a determination of whether the City had a policy or custom sufficient for §1983 liability. Since collateral estoppel can only apply when an issue is actually and necessarily determined by a court, *Montana v. United States,* 440 U.S. 147, 153 (1979), the *Shield Club* decision does not establish the existence of a municipal policy sufficient to satisfy the requirements of *Monell.*

Prior to the drug testing at issue in this case, no one in Cleveland had ever utilized drug testing of police cadets to avoid hiring drug users as police officers. The screening procedures under discussion in the *Shield Club* case had only been utilized to screen candidates for appointment to the Police Academy.

Petitioners do not contend that a municipal policy not to put drug users on the street as police officers is unconstitutional. *See Nat'l Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989). Furthermore, Petitioners have never suggested that the claimed constitutional infirmities in the drug testing resulted from a failure to train municipal employees.

This Court has repeatedly stated that a city is not liable under §1983 simply because a police officer or other employee executes a constitutional policy in an unconstitutional manner. *Canton v. Harris,* 489 U.S. 378, 387, 389 n.9 (1989); *Oklahoma City v. Tuttle,* 471 U.S. 808, 823 (1985). Under *Monell* and its progeny, the city is only liable when it can be fairly said that the city itself is the wrongdoer. *Collins v. Harker Heights,* _____ U.S. _____, 112 S. Ct. 1061, 1067 (1992).

It was not wrong for the City of Cleveland to be opposed to hiring drug users as police officers. Even the District Court, in finding that the Petitioners' Fourth Amendment right to be free from unreasonable searches had been violated, found fault only with the scope of the intrusion, *i.e.*, the manner in which the drug testing was conducted; the Court recognized the validity of the inception of the search. *Feliciano v. Cleveland*, No. C85-3356 (N.D. Ohio, Nov. 26, 1991) (Pet. pp. A70-A73, A82); *see O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987). Municipal liability under §1983 cannot be based solely on a responsible, appropriate, constitutional policy not to hire drug users as police officers. By comparison, this Court has not allowed municipal liability for an excessive force incident to be based solely on a policy of having police officers respond to robbery or assault reports, *Oklahoma City v. Tuttle, supra, see also Springfield v. Kibbe*, 480 U.S. 257 (1987); nor has it allowed municipal liability for a supervisor's illegal treatment of an employee to be based solely on a policy permitting employees to be transferred or laid off, *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989); nor has it allowed municipal liability for an in-custody death to be based solely on a policy of arresting criminal suspects, *Canton v. Harris, supra.*

Even if collateral estoppel could properly be applied to this case to establish that the City of Cleveland had a policy not to appoint drug users as police officers, the outcome of this case would be the same. The City of Cleveland would not be liable under §1983 for constitutional violations unilaterally initiated by a nonpolicymaking official, even if the official was animated by an intention to further a constitutional policy of the City.

B. The Substantive Due Process Claim.

The only claim against the individual Respondents that the Petitioners preserved in the appellate court was their substantive process claim. The individual Respondents' liability was considered in terms of whether or not a Fourteenth Amendment violation had occurred at all, because the Respondents' assertion of qualified immunity for the substantive due process claim was not reconsidered by the District Court prior to her disposition of the case on other grounds.

Even if there were a substantive due process component to employee drug testing, the individual Respondents against whom the claim is made in this case would be entitled to qualified immunity on the same grounds upon which they were granted qualified immunity on the Fourth Amendment claims. *See Feliciano v. Cleveland*, No. 86-3436 (6th Cir. Apr. 10, 1987) (Pet. pp. A15-A16); *Anderson v. Creighton*, 483 U.S. 635 (1987). The law concerning whether, when, and how employee drug testing could constitutionally be undertaken was far from settled in October, 1985. Consequently, determination of whether a substantive due process violation occurred will not affect the ultimate outcome of this case. Nonetheless, the Court of Appeals' and District Court's determinations that the Petitioners did not suffer a substantive due process deprivation were correct.

The Fourteenth Amendment's guarantee of substantive due process "protects individual liberty against 'certain governmental actions regardless of the procedures used to implement them.' " *Collins v. Harker Heights, supra*, 112 S. Ct. at 1068, quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986). This Court has been particularly cautious in expanding the concept of

substantive due process. *Id.* It has refused to permit the Due Process Clause to be diluted to serve merely as "a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood*, 426 U.S. 341, 350 (1976).

The Court of Appeals stated that in order to succeed on their substantive due process claim, the Petitioners were required to show:

> . . . that the drug test does not bear a reasonable relation to a legitimate government interest, *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977), that the testing procedures were so unreliable that they were irrational or led to irrational results, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), or that the procedures used to collect the urine "shock the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1951).

Feliciano v. Cleveland, 988 F.2d at 657. Petitioners could not establish that any of these circumstances apply to their case.

There can be no serious question that a city has a legitimate governmental interest in whether members of its police force are using illegal drugs. *See, e.g., Von Raab, supra*, 489 U.S. at 679. The accuracy of the testing used to analyze the Petitioners' samples, which included gas chromatography/mass spectrometry,[1] was highly reliable. And, although the methods used to collect the urine were less than ideal, they did not "shock the conscience"; the value of direct observation of urine sample production has been recognized by this Court and others. *Skinner, supra*, 489 U.S. at 626; *McKenna v. Philadelphia*, 771 F. Supp. 124, 125 (E.D. Pa. 1991); *Weicks v. New Orleans Police Dep't*, 706 F. Supp. 453, 456 (E.D. La. 1988), *aff'd*, 868 F.2d 1269 (5th Cir. 1989).

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[1] *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 610 n.3 (1989).

The cases cited by Petitioners that discuss substantive due process were all decided before this Court clarified through *Skinner* and *Von Raab* the Fourth Amendment framework applicable to employee drug testing. *See Jones v. McKenzie,* 628 F. Supp. 1500 (D.D.C. 1986), *rev'd in part,* 833 F.2d 335 (D.C. Cir. 1987), *vacated sub nom. Jenkins v. Jones,* 490 U.S. 1001 (1989), *aff'd and amended,* 878 F.2d 1476 (D.C. Cir. 1989); *Capua v. Plainfield,* 643 F. Supp. 1507 (D.N.J. 1986); *Copeland v. Philadelphia Police Dep't,* 840 F.2d 1139 (3d Cir. 1988); *Everett v. Napper,* 833 F.2d 1507 (11th Cir. 1987); *Rushton v. Nebraska Pub. Power Dist.,* 653 F. Supp. 1510 (D. Neb. 1987), *aff'd,* 844 F.2d 562 (8th Cir. 1988). The Fourth Amendment provides "an explicit textual source of constitutional protection," *Graham v. Connor,* 490 U.S. 386, 395 (1989), against public employers engaging in unreasonable drug testing practices. There is no need to extend "the more generalized notion of 'substantive due process' ", *id.,* to the topic.

CONCLUSION

Had this case been submitted to the Court for review five or ten years ago, it would have presented several unresolved issues of municipal liability under 42 U.S.C. §1983 and of the constitutionality of public employee drug testing. However, since the drug testing of the Petitioners in October, 1985, the law in both of these areas has evolved considerably through the pronouncements of this Court.

Review of this case will neither advance the development of the relevant areas of the law nor alter the ultimate outcome of the case. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

ORDER (MARGIN ENTRY) OF THE UNITED STATES DISTRICT COURT

(April 11, 1986)

Case No. C85-3356

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAUL FELICIANO, JR., *et al.*,
Plaintiffs,

vs.

CITY OF CLEVELAND, *et al.*,
Defendants.

HON. ANN ALDRICH

MOTION OF DEFENDANTS HANTON, BRATZ, BARTLEY, GROUDEL, JAMES AND TURNER FOR DISMISSAL OR SUMMARY JUDGMENT

MOTION

Defendants, William T. Hanton, Lloyd Bratz, William Bartley, Glen Groudel, Ronald James and Reginald M. Turner, hereinafter referred to as the "Individual Defendants," hereby move the Court, pursuant to Rules 12(b) and/or 56(b) of the Federal Rules of Civil Procedure, for the entry of an order dismissing this action as against them, or granting summary

judgment in their favor, on the ground that they are shielded from liability herein on the basis of the doctrine of qualified immunity.

* * * * *

[MARGIN ENTRY]

Motion denied as premature, without prejudice. SO ORDERED.

/s/ ANN ALDRICH
April 11, 1986

ORDER OF THE UNITED STATES DISTRICT COURT

(December 14, 1989)

Civil Action No. C85-3356

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAUL FELICIANO, JR., *et al.*,
Plaintiffs,

vs.

CITY OF CLEVELAND, *et al.*,
Defendants.

ORDER

ALDRICH, *J.*

In light of the recent decision of the United States Supreme Court in *National Treasury Employees Union v. Von Raab*, _____ U.S. _____, 109 S.Ct. 1384 (1989), this Court's June 12, 1987 order granting plaintiffs' motion for partial summary judgment and denying defendants' motion for summary judgment on the fourth amendment claims is hereby vacated. *See also Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir. 1989) (per curiam), *cert. denied*, _____ U.S. _____, 1989 U.S. LEXIS 5423 (1989); *Wrightsell v. City of Chicago*, _____ F.Supp. _____, 1989 U.S. Dist. LEXIS 10684 (N.D. Ill. Sept. 7, 1989); *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, _____ F.Supp. _____, 1989 U.S. Dist.

LEXIS 3664 (E.D. Pa. April 7, 1989); *Brown v. City of Detroit*, 715 F.Supp. 832 (E.D. Mich. 1989); *Hartness v. Bush*, 712 F.Supp. 986 (D.D.C. 1989). *But see Metz v. City of New York*, _____ F.Supp. _____, 1989 U.S. Dist. LEXIS 13060 (S.D.N.Y. Nov. 1, 1989) (Metz's motion for summary judgment denied because material questions existed concerning reasonableness, evaluated with reference to *Von Raab*, of drug testing procedures used to test probationary police officers); *Strawder v. City of Chicago*, _____ F.Supp. _____, 1989 U.S. Dist. LEXIS 12541 (N.D. Ill. Oct. 19, 1989) (summary judgment granted for city and against former probationary police officer who had had notice of drug testing program which contained procedural safeguards).

Plaintiffs may submit, within thirty (30) days of the date of this Order, a brief showing cause why defendants' motion for summary judgment on the fourth amendment claims should not be granted.

IT IS SO ORDERED.

/s/ ANN ALDRICH
United States District Judge